IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SHAUN KHARY DIGGS, Appellant.	No. 37127-8-II UNPUBLISHED OPINION

Houghton, P.J. — Shaun Diggs appeals his convictions for two counts of unlawful display of a weapon, arguing that the trial court should have instructed the jury on self-defense and allowed him to testify regarding past dangerous circumstances that cause him to be hypervigilant. He also argues that his convictions under the same statute based on one act of displaying a weapon to two people violate double jeopardy principles. We reverse and remand for new trial.

FACTS[1]

On August 21, 2007, Jacob Kreifels, Nicole Cardell, Brandon Chapman, and James Bolinsky met in the Pizza Hut parking lot in Bremerton. Around 7 p.m., Diggs parked next to Bolinsky's car. Diggs, a black male, had never met Kreifels, Cardell, Chapman, or Bolinsky.

Diggs's girl friend, Chelsea Parker, a Pizza Hut employee, came out of the restaurant and

[1] We derive the facts from the evidence adduced at trial and relate it in the light most favorable to Diggs.

talked with Kreifels for a few minutes. When she noticed Diggs, she walked over to his car. Diggs saw Kreifels looking at him funny and asked Parker about it; she informed Diggs that Kreifels, her former co-worker, had lost his job for using racial slurs.

Shortly after, Kreifels and his friends started walking toward the cars. Diggs heard someone use profanity and then saw Kreifels standing within a few feet of Parker. Diggs testified that Kreifels's behavior drew his attention. When asked at trial by defense counsel what happened next, Diggs replied,

> I looked at [Kreifels], had eye contact, grabbed my holster. Because it was three guys. It wasn't just [Kreifels]. It was all three guys. And I grabbed my holster. And I'm looking at him, and the whole time I'm just, you know, watching him, watching his every move. And they're walking behind [Parker].[2]

4 Report of Proceedings (RP) at 359. Diggs was concerned because Kreifels had been fired for using racial slurs. When the State asked why he displayed his holster, Diggs said he did so to warn Kreifels and his friends to stay away and to show them that he had a gun.

After Diggs raised the holster, he said to Kreifels, "Don't talk to her like that. Don't talk to my girl like that." 4 RP at 359. Diggs testified that Kreifels replied, "I don't give a f---. This is my girl right here. Let's get out of here." 4 RP at 360. Both cars left. A few minutes later, Kreifels called the police and reported that Diggs threatened him with a gun.

[2] According to Kreifels, Cardell, and Chapman, Diggs displayed a gun, not a holster.

Later, the police arrested Diggs. The officers found a holster, a handgun, and a loaded magazine clip in Diggs's vehicle.[3] An officer read Diggs his *Miranda*[4] warnings, and Diggs agreed to talk. During one of his discussions with the officer, Diggs said that Kreifels and his friends "looked at him crazy." 2 RP at 130-31.

The State charged Diggs with two counts of second degree assault, each with a firearm enhancement. At trial, he sought to introduce evidence in support of his self-defense theory, specifically that he grew up in a rough neighborhood of Harlem, New York; attended a school with a significant gang problem; and served in Iraq, where he often stood guard. Defense counsel argued that these experiences caused Diggs to be hypervigilant and that they were relevant to the subjective prong of Diggs's self-defense theory.

The State argued that Diggs could not claim self-defense while also asserting that he did not commit an assault.[5] The State also argued that his experiences in New York and Iraq were not relevant to the August 21 events and only served to create sympathy in the jurors' minds.

The trial court ruled that because Diggs denied brandishing a gun, he "[did] not commit under this version of the facts an act that needs to be justified by the defense." 4 RP at 342. The trial court also ruled that

> when looking at the issue of self-defense, that even if this was a fact pattern, if we were -- if we were looking at this as a fact pattern where the defendant acknowledged that he in some way, shape, or form brandished the weapon. That looking at the facts and construing them under the offer of proof most favorably to the defendant and -- and assuming the facts as proffered by the defendant most

[3] Diggs also had a concealed weapons permit in his pocket.

[4] *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[5] The State conceded that tapping an empty holster does not constitute assault.

> favorably construed to him, that a reasonable person with the defendant's personal history, that's the subjective part of the test having to do with participation in the military and his upbringing, would not have believed that they were about to be injured in the fact pattern that's presented here at the Pizza Hut.

4 RP at 342-43. Having found that Diggs was not entitled to a self-defense claim, the trial court excluded his evidence of hypervigilance on the grounds that it was irrelevant and would tend to evoke a sympathetic response from the jury.[6]

After Diggs testified to the August 21 events, he renewed his request to testify to his evidence of hypervigilance. In this request, he drew attention to his waving instead of tapping his holster and Kreifels making what he argued were threatening statements. The State argued these details did not change the legal tenor of the August 21 events. The trial court again denied that request and declined to instruct the jury on self-defense.

The jury found Diggs not guilty of both counts of second degree assault and guilty of both counts of the lesser included charge of unlawful display of a weapon. He appeals.

ANALYSIS

I. Diggs's Jury Instructions on Self-defense

Diggs argues that the trial court erred in rejecting his proposed self-defense instructions. He asserts that because he produced some evidence in support of his self-defense theory, an instruction was proper.

---

[6] The trial court permitted Diggs to testify to some background information as long as it did not describe any "dangerous circumstances." 4 RP at 345. He testified that he grew up in Harlem, entered the Navy after graduating from high school, achieved the rank of second class petty officer, served in Iraq and Afghanistan, was honorably discharged in 2002, and currently worked at a car dealership.

Sufficient jury instructions allow the parties to argue their theories of the case and properly inform the jury of the applicable law. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). Each party may instruct the jury on its theory of the case as long as evidence exists to support that theory. Failure to instruct on a defense theory supported by the evidence constitutes reversible error. *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997).

A trial court provides self-defense instructions after the defendant produces some evidence tending to prove that the circumstances amounted to self-defense. *State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998). A trial court may refuse to give a self-defense instruction only where no credible evidence supports the claim. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). That evidence can come from any source. *McCullum*, 98 Wn.2d at 488; *accord State v. Roberts*, 88 Wn.2d 337, 345, 562 P.2d 1259 (1977). When deciding this issue, the trial court reviews the entire record in the light most favorable to the defendant. *State v. Callahan*, 87 Wn. App. 925, 933, 943 P.2d 676 (1997).

The test for whether the defendant met his burden of producing "some evidence" incorporates both a subjective and objective component. *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). The subjective component requires the trial court to stand in the defendant's shoes and evaluate the defendant's actions in light of all the facts and circumstances known to the defendant. *Walker*, 136 Wn.2d at 772; *Janes*, 121 Wn.2d at 238. The objective component requires the trial court to determine what a reasonably prudent person would have done in the defendant's situation. *Walker*, 136 Wn.2d at 772-73.

Proving self-defense requires evidence that (1) the defendant subjectively feared imminent

danger of death or great bodily harm, (2) the defendant's fears were objectively reasonable, (3) the defendant used no greater force than reasonably necessary, and (4) the defendant was not the aggressor. *Callahan*, 87 Wn. App. at 929. Imminent danger need not actually exist as long as a reasonable person in defendant's situation could have believed it existed. *Walker*, 136 Wn.2d at 772. Imminence does not require an actual physical assault; a threat can support a finding of imminence where the defendant actually and reasonably believed the threat would be carried out. *Janes*, 121 Wn.2d at 241. If some evidence supports all elements of self-defense, then the court must permit the presentation of self-defense instructions to the jury. *Walker*, 136 Wn.2d at 772-73; *Williams*, 132 Wn.2d at 259-60.

When analyzing a trial court's refusal to permit jury instructions on self-defense, the standard of review depends on whether the trial court based its decision on a matter of law or of fact. *Walker*, 136 Wn.2d at 771. We review de novo a trial court's finding that no reasonable person in the defendant's shoes would have acted as defendant acted. *State v. Read*, 147 Wn.2d 238, 243, 53 P.3d 26 (2002).

A. Admission to the Underlying Act

The trial court first decided that Diggs was not entitled to a self-defense instruction because he denied brandishing a gun. We disagree under the facts here.

Our Supreme Court has held that "[o]ne cannot deny that he struck someone and then claim that he struck them in self-defense." *State v. Aleshire*, 89 Wn.2d 67, 71, 568 P.2d 799 (1977) (denying defendant's request for self-defense instructions where he expressly denied participating in the bar fight giving rise to his assault charge). Since then, Divisions One and

Three have held that a defendant cannot receive self-defense instructions when denying committing the act underlying the charged crime. *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000); *State v. Gogolin*, 45 Wn. App. 640, 643-44, 727 P.2d 683 (1986), *accord State v. Pottorff*, 138 Wn. App. 343, 348, 156 P.3d 955 (2007) ("A defendant asserting self-defense is ordinarily required to admit an assault occurred.").

Nevertheless, we have held that a defendant may support his request for self-defense instructions with evidence inconsistent with his own testimony. *Callahan*, 87 Wn. App. at 933 (permitting defendant's self-defense claim where he denied intentionally aiming his gun or firing at the victim but victim testified that defendant aimed the gun at his head). In *Callahan*, we interpreted *Aleshire* as a case where the defendant lacked evidence in support of a necessary element of self-defense rather than evidence that the defendant committed the underlying act. *Callahan*, 87 Wn. App. at 931-32.

Here, the State's witnesses said that Diggs waved a gun. Diggs denied that he brandished a gun but claimed that he waved an empty holster and that he did so out of an intent to defend himself. Diggs's situation more closely resembles that in *Callahan* than *Aleshire* because, unlike Aleshire, both Callahan and Diggs admitted that the altercation occurred and had evidence supporting their self-defense claims even though the evidence was inconsistent with their own testimony. *Aleshire*, 89 Wn.2d at 71; *Callahan*, 87 Wn. App. at 928, 931-32. Thus, Diggs was entitled to argue that he acted in self-defense as long as he presented some evidence in support of the elements of self-defense. *See Walker*, 136 Wn.2d at 772-73 and *Callahan*, 87 Wn. App. at 933.

B. Reasonable Belief of Imminent Great Bodily Harm

The trial court also decided that, assuming Diggs brandished the gun, no reasonable person in his situation would have believed he was about to be injured. We review this decision de novo. *Read*, 147 Wn.2d at 243.

Diggs, a black male, encountered three males previously unknown to him, one of whom had lost his job for using racial slurs, walking toward his girl friend and his car, looking at him funny, and swearing. Given these circumstances, Diggs presented some evidence that a reasonable person in his situation could have feared imminent danger of great bodily harm.[7] *See Walker*, 136 Wn.2d at 772-73. By refusing to instruct the jury on self-defense, the trial court committed reversible error. *Williams*, 132 Wn.2d at 259-60. Thus, we reverse and remand for a new trial on unlawful display of a weapon with appropriate instructions.[8]

II. Diggs's Hypervigilance Background

Diggs also argues that the trial court denied him his constitutional right to present relevant evidence in his defense by preventing him from discussing his experiences in Harlem and in the military. He asserts that this evidence was relevant to prove the subjective element of his self-defense claim, to "let the jury know the defendant," and to explain away testimony by the State's

[7] Contrary to the State's assertions at oral argument, Diggs produced some evidence of his subjective belief. The trial court did not address, and the State does not contest, whether he used no greater force than reasonably necessary and was not the initial aggressor. In any event, we also find that he successfully produced some evidence in support of these two factors.

[8] On May 12, 2009, Diggs submitted a statement of additional authorities citing *State v. George*, 146 Wn. App. 906, 193 P.3d 693 (2008), in support of his argument in favor of self-defense instructions. Having found in his favor on this issue, we do not address the merit of his additional authority.

witnesses that Diggs said, "New York all day," when he brandished the gun.[9] Appellant's Br. at 17, 19.

Because the trial court ruled on the admissibility of Diggs's hypervigilance evidence, assuming he was not entitled to self-defense, it necessarily did not rule on the relevance of that evidence to the subjective prong of self-defense. Thus, on retrial, the trial court should reconsider this issue in light of our decision that the trial court should instruct the jury on self-defense. We decline to address his remaining arguments in support of his evidence of hypervigilance because he did not raise these arguments at trial. RAP 2.5(a).[10]

III. Double Jeopardy

Diggs further argues that his two convictions for unlawful display of a weapon based on one act of displaying a weapon to two people violate the double jeopardy clauses of the United States and Washington State Constitutions.[11] Because we reverse his convictions on other grounds, we do not address this further.

[9] All of the State's witnesses testified that when Diggs brandished a gun, he said something to the effect of "New York all day." 3 RP at 205; 4 RP at 258. Chapman thought the comment related to a gang.

[10] RAP 2.5(a) provides in part, "The appellate court may refuse to review any claim of error which was not raised in the trial court."

[11] The double jeopardy clauses of the United States and Washington State Constitutions protect a defendant from multiple convictions for the same crime. *State v. Tvedt*, 153 Wn.2d 705, 710, 107 P.3d 728 (2005).

Reversed and remanded for a new trial.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

_____
Houghton, P.J.

We concur:

_____
Hunt, J.

_____
Quinn-Brintnall, J.